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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

NO. 74-894

LESTER RYAN,
Petitioner,

-vs-

STATE OF INDIANA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE INDIANA SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

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OPINIONS BELOW

Indiana Court of Appeals, First District Cause No. 1-1273 A 221 (9 July, 1974) ___ Ind.___; 313 N.E.2d 351. Petition to Transfer to Indiana Supreme Court, Denied without opinion

31 October, 1974.

JURISDICTION

The State of Indiana questions the right of Petitioner to appeal this action as the validity of a state statute is not involved and no federal question of substance was presented to or determined by the State of Indiana.

QUESTION PRESENTED

Whether a trial court can properly modify its own sentence to bring it within the provisions of the law. In the state courts the Appellant-Petitioner stated the issue for review.

"There is one (1) issue for review by this Court concerning the validity of the conviction and sentencing of Appellant Lester Ryan,

as presented by the record of the proceedings:

1. The Court below erred in imposing an illegal executed sentence because the term of service and imprisonment, by the Court's records, should have commenced in the future, which is contrary to law, because the term of service and imprisonment shall commence from the day of conviction and sentence."

Statutes Involved.

IC 35-1-54-4 Assault and Battery;
IC 35-4.1-4-17 Correction of Erroneous Sentence.

STATEMENT

Lester Ryan was involved in a domestic quarrel and shot his son in law's father. He was charged with assault and battery with intent to kill. He entered a plea of guilty to the lesser included offense of assault and battery. On February 2, 197[illegible],

he was sentenced as follows:

> The court now hears sworn statements of the defendant and others in open court and the court having seen and examined the pre-commitment investigation and being duly advised in the premises, does now on the plea of guilty of the defendant to the included charge of assault and battery, now finds the defendant guilty of assault and battery. It is, therefore, considered, ordered and adjudged that the defendant for the crime by him committed be fined in the sum of $500.00 and costs of this action and sentenced to the Lawrence County jail for a term of six months, which term shall be served as follows: two days each weekend between the hours of 8:00 A.M. on Sunday to the hour of 8:00 P.M. on the following Tuesday until said 180 days be served. Upon the payment of fine and upon completion of service of such sentence, clerk is ordered to release defendant's bond of record. (Tr.p. 60).

On February 16, 1973, Ryan filed a Motion to Stay Execution of the Sentence.

The motion was sustained.

On October 5, 1973, the Court corrected the judgment and sentence rendered, by striking therefrom the underlined portion. The Court went on to hold:

> It is now ordered and adjudged by the court that said defendant be committed to the Lawrence County jail for a term of six months and that he be allowed credit of 14 days thereon from date of judgment February 2, 1973, until February 16, 1973, at which time execution of the judgment was stayed by this court. (Tr. p. 38).

ARGUMENT

Under rules of the Supreme Court of the United States; Rule 23(1)(f) provides:

> (f) If review of the judgment of a state court is sought, the statement of the case shall also

specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised, the method of raising them (e.g. by a pleading, by request to charge and exceptions, by assignment of error), and the way in which they were passed upon by the court, such pertinent quotations of specific portions of the record or summary thereto, with specific reference to the places in the record where the matter appears (e.g., ruling on exception portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

The Petitioner now raises a question not presented to the trial court, the Indiana Court of Appeals, or the Indiana Supreme Court. That question is "Whether or not it constitutes a denial of due process to increase a prison term already imposed

when the accused undertakes the first step of an appeal."

Petitioner alleges that the trial court imposed a harsher sentence by sustaining his Motion to Correct Errors. The argument presented by the Petitioner is without substance.

The petitioner was sentenced to serve one hundred eighty (180) days; to be served on weekends. The statute provided for a penalty of one hundred and eighty days IC 35-1-54-1. Petitioner filed a Motion to Correct Errors alleging that the sentence was illegal in that it was to begin at a future time. In response to the motion the trial court changed the

the sentence (IC 35-4.1-17) to 180 days giving defendant credit on his sentence for the fourteen days between original sentence and stay of execution.

The State is unable to understand Petitioner's mathematical formula under which he alleges that 180 days is a harsher sentence than 180 days (i.e. 60 x 3 day periods).

Each sentence being for 180 days no harsher sentence was imposed by the modification and in fact Petitioner received credit for fourteen days which he did not serve.

The validity of a state statute is not involved here and there is no federal question of substance pre-

sented by the petitioner.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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